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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-8

J. B. O'CONNOR, M.D.,

Petitioner,

vs.

KENNETH DONALDSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR STATE OF NEW JERSEY AS AMICUS CURIAE

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BRIEF FOR STATE OF NEW JERSEY AS AMICUS CURIAE

Interest of the Amicus

The State of New Jersey, acting by and through its Attorney General, respectfully submits this brief as amicus curiae, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, because of its importance to the State in the operation of its state resi-

denial facilities for the mentally ill and the mentally retarded.

The State of New Jersey has been engaged in the residential treatment of mental disorders for many years. Thus, of the more than 30 mental institutions established or expanded throughout the world by Dorthea Dix, the famed pioneer in the mental health field, the first state hospital in the United States to be built entirely as a result of her efforts was the Trenton State Hospital, built in 1848. As in most states, the New Jersey in-patient psychiatric facilities are financed by state appropriations, staffed by state civil service employees, and operated for the care and treatment of the menally ill who are admitted thereto without regard to their ability to pay or their state domicile or residence. The resident population of the 20 New Jersey facilities for the mentally ill and mentally retarded is approximately 18,700 persons. It is estimated that perhaps 60% of the mentally ill patients were committed involuntarily.

The Division of Mental Health and Hospitals of the New Jersey Department of Institutions and Agencies provides professional and administrative leadership in the planning and programming of mental health facilities for the State. Its present role is a highly complex one and includes, consistent with modern medical aims, stimulating the development of non-State operated diagnostic and treatment facilities, and co-ordinating the planning of all possible resources for the most effective utilization of manpower and financing available. The traditional function of the State in the operation of large inpatient psychiatric hospitals, however, remains a major undertaking of the State, as it is for most states. New Jersey State appropriations for the 1974 fiscal year for operating the seven state mental hospitals are approximately $78,000,000.

An additional amount of approximately $19,000,000 is appropriated for state aid for the seven county mental hospitals.

In 1965, the State Legislature enacted a statutory right to treatment for the mentally ill and the mentally retarded, N.J.S.A. 30:4-24.1, with a remedy in support of the right of habeas corpus. N.J.S.A. 30:4-24.2. See *State* v. *Carter*, 64 N. J. 382, 393 (1974); *Singer* v. *State*, 63 N. J. 319 (1973). When a person is admitted to a state hospital for the mentally ill in New Jersey, he is entitled, pursuant to N.J.S.A. 30:4-24.1, to receive treatment as follows:

> "Every individual who is mentally ill or mentally retarded shall be entitled to humane care and treatment and, *to the extent that facilities, equipment and personnel are available,* to medical care and other professional services in accordance with the highest standards."

Thus, the right of a patient to treatment is necessarily qualified by the legislative recognition that the resources of the state are, of course, limited. While the state mental hospitals have a duty to treat their patients to the extent that their facilities, equipment and personnel are available, their very operations involve difficult questions of the allocation of the State's resources, which the Court has recognized in other areas to be matters uniquely within the province of the Legislature to determine. See e.g., *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *Jefferson* v. *Hackney*, 406 U. S. 535 (1972); *San Antonio Independent School District* v. *Rodridguez*, 411 U. S. 1 (1973).

In enacting the 1965 Act, the New Jersey Legislature therein defined "mental illness" as a mental disease to such an extent that a person so afflicted requires care and

treatment "for his own welfare, or the welfare of others, or of the community." N.J.S.A. 30:4-23. It thereby adopted the traditional decisional definition of persons who may be involuntarily restrained. *Bolton* v. *Harris,* 395 F. 2d 642 (D. C. Cir. 1968). Thus, persons suffering from mental illness may not be involuntarily committed merely because they may "benefit" from hospitalization, or even when they may require it unless their needs are such that their commitment is necessary for their own welfare or the welfare of others or the community.

New Jersey has also long had judicial procedures whereby any patient of a mental hospital who claimed his confinement was improper could obtain meaningful judicial review. See *e.g., Allgor* v. *N. J. State Hospital,* 80 N. J. Eq. 386 (Chan. 1912); *Ex Parte Perry,* 137 N. J. Eq. 161 (Chan. 1945); *In re R.R.,* 140 N. J. Eq. 371 (Chan. 1947); *In re Heukelekian,* 24 N. J. Super. 407 (App. Div. 1953). Recently, the state civil commitment procedures were reexamined by the Chief Justice of the Supreme Court of New Jersey who on November 12, 1974 issued new policies and procedures of judicial administration to substantially strengthen the protections afforded involuntary admittees. These measures are designed to accelerate the time period within which final commitment hearings must be held, to improve the written notice procedures, to restrict adjournments of final hearings, and to require periodic judicial review of all patients involuntarily committed.

The State of New Jersey thus wholeheartedly endorses the principle that the mentally ill have a right to treatment. Indeed, its Legislature has provided for the aforesaid statutory right to such care, in accordance with the highest accepted standards, and to the extent that facilities, equipment and personnel are available, and proceed-

ures whereby the mentally ill may seek release on the grounds that continued confinement would not be appropriate. Nevertheless, since there is substantial disagreement as to what constitutes "care and treatment" of the mentally ill, and given the serious problems of revenue-raising and the allocation of limited governmental resources among numerous vital state services, the State of New Jersey, as amicus curiae, has a vital interest in seeking a reversal of the damages aspect of the decision below. The recognition of a constitutional right to treatment, not as a basis for the traditional remedy of release from institutionalization, but as a basis for a retroactive money damages award against state psychiatrists personally, grounded largely on a state's limited fiscal, administrative and manpower resources, will not advance any state's efforts to improve its mental health program. Rather, funds which, but for the decision, would have been earmarked for the development of staff, programs or physical plant may, by necessity, be thereby diverted to finance the legal defense or indemnification of overworked and modestly paid state hospital personnel who will be suable by former patients for violation of a heretofore undefined "right to treatment". The State of New Jersey, therefore, strongly urges the Court to reverse the decision of the court below.

ARGUMENT

State-employed psychiatrists, who reasonably attempt to provide patients of a State institution with medical care within the scope of available State facilities and finances, should not be held personally liable for money damages in a patient's civil rights action based upon a newly recognized constitutional right to treatment.

The Court has consistently recognized that there are intractable economic, social and even philosophical problems presented in social legislation, and has specifically held that "the Constitution does not empower the Court to second-guess state officials charged with the responsibility of allocating limited public funds among the myriad of potential recipients". See e.g., in the welfare area, *Dandridge* v. *Williams, supra; Jefferson* v. *Hackney, supra;* and in the financing and managing of a statewide public school system, *San Antonio Independent School District* v. *Rodriguez, supra.* The same principles should also be applicable to the financing and managing of state mental hospitals.

In this case the decision below admittedly did not scrutinize Florida's entire program of mental health residential facilities. Nevertheless, as a threshold consideration, it should be viewed in terms of the real root cause of the paucity of sufficient personnel, finances and resources at the Florida State Hospital which rendered it impossible for the physicians to have afforded a level of treatment to Donaldson which the court would later find acceptable. It cannot be seriously doubted that only the Florida Legislature, and not the attending physicians, had determined whether the State should operate residential facilities for the mentally ill at all, and to what extent it should exercise

its taxation powers and expend its limited revenues among this one of many social ills. Even assuming that the present system of financing mental hospitals in many states leaves much to be desired it should be remembered that ". . . the Constitution does not provide judicial remedies for every social and economic ill". *Lindsey* v. *Normet,* 405 U. S. 56 (1972). Therefore, the lower court decision could drastically impede a state's ability to find, recruit and retain the services of essential medical, para-medical and administrative personnel for mental hospitals, once it is mandated that they may hereafter be held personally liable for a failure to treat a former patient notwithstanding the fact that the underlying cause is, in reality, a lack of state-funded resources.

The court below found that a former patient involuntarily committed to a state hospital had a right to treatment based on the Due Process Clause of the Fourteenth Amendment. Cf., *New York State Association for Retarded Children, Inc.* v. *Rockefeller,* 357 F. Supp 752 (E. D. N. Y. 1973) and *Burnham* v. *Department of Public Health of the State of Georgia,* 349 F. Supp. 1335 (N. D. Ga. 1974). The striking point of departure of the decision from previous cases dealing with a right to treatment, however, lies in the fact that it enunciates such a new constitutional right while simultaneously holding that it forms the basis for a personal money damage award under 42 U.S.C.A. §1983 against a state employee. Heretofore, the courts which have examined the problem and found a right to treatment, whether on constitutional or statutory grounds, have not entered a judgment for money damages, but have vindicated the right by the traditional remedy of release under habeas corpus. See e.g., *Rouse* v. *Cameron,* 373 F. 2d 451 (D. C. Cir. 1967); *Dixon* v. *Jacobs,* 427 F. 2d 589 (D. C. Cir. 1970); and *Nason* v. *Superintendent*

of Bridgewater State Hospital, 353 Mass. 604, 233 N. E. 2d 908 (Sup. Ct. 1968). These cases recognize that release by habeas corpus will not only prevent indeterminate confinement without treatment, but also that when, through no fault of the institution or the physicians, treatment may not be available, release is necessary because the officials will be unable to guarantee the patient's rights within the institution. They further recognize that actual outright release may frequently not be the proper remedy, and that conditional release may be in order, or that an order permitting the hospital a reasonable opportunity to initiate treatment may be appropriate. See, *Tribby* v. *Cameron*, 379 F. 2d 104 (D. C. Cir. 1967); and *Nason* v. *Superintendent of Bridgewater Hospital*, supra.

The unfairness in the present case is that prior to the imposition of liability herein, and unlike the earlier right to treatment cases, there was no initial court order permitting the hospital or physicians some reasonable opportunity to initiate treatment, or ordering the unconditional or conditional release of respondent after opportunity for treatment was exhausted or treatment was deemed inappropriate. Neither was there any preliminary order that the state hospital's treatment programs be evaluated or upgraded. Instead, the court enunciated the constitutional right, applied it to a patient no longer hospitalized, and simultaneously upheld a monetary award for violation of that right.

A further serious concern raised by this case is the ironic imposition of damages upon the state physicians personally in view of the fact that the State itself could not be so held liable even though insufficient state funding was the underlying cause of inability to meaningfully treat respondent. A state is immune from federal actions

against it by citizens of another state without its consent, and is equally immune from such actions by its own citizens. *Duhne* v. *State of New Jersey*, 251 U. S. 311 (1920). The Eleventh Amendment bars suits not only against a state when it is the named party but also when it is the party in fact in an action seeking damages from the public treasury. *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47 (1943). In *Edelman* v. *Jordan*, —— U. S. ——, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), the Court recently re-enunciated the rule that a federal court's remedial power may not include a retroactive award which requires the payment of funds from the state treasury. Additionally, a municipal corporation cannot be a "person" within the ambit of 42 U.S.C.A. §1983. *Monroe* v. *Pape*, 365 U. S. 167 (1961), whether the remedy sought is damages or equitable relief, *City of Kenosha, Wisc.* v. *Bruno*, 412 U. S. 507 (1973). Thus, even if inadequate state funding prevents state psychiatrists from affording adequate treatment to patients in state institutions, neither the state nor any of its agencies can be held liable for same nor even be the subject of a suit under the Civil Rights Act. To transpose liability for such inadequacies to state psychiatrists, who lack control or jurisdiction over such fiscal determinations, would be manifestly unfair.

As the Court noted in *Smith* v. *Spina*, 477 F. 2d 1140, 1143 (3rd Cir. 1973), the Civil Rights Act is not a general tort statute:

> "It is, of course, fundamental that the Civil Rights Act permits recovery for only 'deprivations of any rights, privileges, or immunities secured by the [federal] Constitution and [federal] laws'. We have recently said: 'It becomes important to delineate that conduct which is actionable in state courts as a tort, and that which is actionable in federal courts under §1983."

These principles have been applied to actions by state prison inmates under the Civil Rights Act wherein they have sued state officials for alleged improper or inadequate medical care. See, e.g., *Isenberg* v. *Prasse*, 433 F. 2d 449 (3rd Cir. 1970); *Gittlemacker* v. *Prasse*, 428 F. 2d 1 (3rd Cir. 1970). Similarly, in *Pierson* v. *Ray*, 386 U. S. 547 (1967), the Court held that the defense of "good faith and probable cause" is available to police officers sued under 42 U.S.C.A. §1983 for an alleged false arrest and imprisonment. Recently, the Court indicated that when the conduct of higher officers of the executive branch, as distinguished from local police, are evaluated in such suits, "the inquiry is far more complex since their range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions, is virtually infinite." *Scheuer* v. *Rhodes*, —— U. S. ——, 94 S. Ct. ——, 40 L. Ed. 2d 90 (1974).

While in the instant case the court paid lip-service to allowing the state psychiatrists a "good faith" defense in cases of this kind, by ignoring the evidence that insufficient resources at the state hospital in reality made adequate treatment impossible, it thereby effectively eliminated such a defense. It is also seriously questionable whether there was the sufficient analysis below of the responsibilities of the physicians, the scope of their discretion, and all of the circumstances as they reasonably appeared at the time of the action, as called for by *Scheuer* v. *Rhodes*, *supra*. There is wide professional disagreement not only as to what constitutes or causes mental illness but even on the methods of how to treat it. No one can reasonably disagree that psychiatry is an area of medical science still plagued with uncertainty. See *Rouse* v. *Cameron*, *supra*. Medical science has not succeeded yet in finding a cure for every disease and this is just as true

of mental diseases as cancer. Even if all patients are "treatable," which Judge Bazelon has stated may be a legal fiction (80 Harv. L. Rev. 898, 900 (1967)), still there is, and could be, no rule demanding that a hospital cure all cases according to a specific timetable. No one can demonstrate with assurance that increased resources would accomplish a cure or substantial improvement in respondent's condition. For example, assume the Hospital had the financial resources to assign an expert psychiatrist solely to treat him. Would this guarantee his cure or substantial improvement? No. No one has yet shown convincingly that schizophrenia, with which respondent was afflicted, is curable by a prolonged one-to-one relationship with a therapist. The *Comprehensive Textbook of Psychiatry* by A. M. Friedman, M.D., and Harold I. Kaplan, M.D. (1967), p. 1436, states with authority about such cases that:

> "Outcome seems to be more a function of the disorder than of the type or amount of treatment."

Thus, improvement of the patient is not a reliable index of whether he is being treated, at least within reasonable limits. Studies have shown that for some disorders there is a spontaneous remission rate as high as 20 per cent without any treatment, and on the other hand, some patients will not recover no matter what treatment is attempted. See "Note," *Civil Restraint, Mental Illness and the Right to Treatment*, 77 Yale L. Rev. 87 (1969).

It is significant that respondent had, prior to this case, brought fifteen habeas corpus cases in the state and federal courts, all of which were unsuccessful. Were not the physicians acting reasonably when they believed that the court dispositions of respondent's multiple petitions indicated that his confinement and treatment were not improper? Further, no one has ever suggested that they

thwarted respondent's many applications for release by habeas corpus or otherwise impeded his access to the courts. It should also be considered that there are no facts herein tending to indicate that the respondent's treatment was substantially different or inferior to that rendered others based on extraordinary grounds, *e.g.*, racial or religious discrimination, or cruelty. Neither were there any facts indicating the physicians singled out respondent for inferior treatment intentionally, or were motivated by malice or ill-will. For these reasons it seems abundantly clear that the scope of the defense of good faith, to which the state physicians should have been entitled, was misapplied. The findings of the District Court point to the conclusion that the Florida state physicians did a poor job in caring for Donaldson. However, the imposition of monetary liability upon a physician under the Civil Rights Act simply because he has failed to do a proper job would be an unwarranted and improper extension of the terms of that Act.

Finally, in *Pierson*, the Court also held that "a police officer is not charged with predicting the future course of constitutional law", 386 U. S. at 557. Since *Pierson*, the rule has been applied in a variety of factual contexts to avoid the harsh imposition of liability retroactively when the courts are enunciating new constitutional rules. See e.g., *McKinney* v. *DeBord*, 324 F. Supp. 928 (E. D. Cal. 1970) (prison officials); *Westberry* v. *Fisher*, 309 F. Supp. 12 (D. Me. 1970) (welfare officials); and *Kirstein* v. *Rectors and Visitors of University of Va.*, 309 F. Supp. 184 (E. D. Va. 1970) (university officials). No apparent persuasive reason exists why the same rule should not also be applied to state psychiatrists sued in a Civil Rights action by a former patient wherein the court is imposing a constitutional right to treatment in a case of first impression, so as to avoid the imposition of retroactive liability in such an unfair manner.

The conflict between social and individual interests existing in this case can be fully reconciled only by public allocation of larger sums of money to mental hospitals, which obviously is a fundamentally political question. While there may be no legitimate state interest in the permanent detention of the mentally ill unless they are dangerous to society, the recognition of a new constitutional right to treatment at the simultaneous expense of a state employee is not an appropriate application of the Civil Rights Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below upholding an award of money damages against the state physicians under the Civil Rights Act is erroneous and therefore should be reversed.

Respectfully submitted,

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